APPENDIX A

The relevant provisions of the Labor Management Relations Act of 1947 61 Stat. 136, 29 U.S.C. 141, *et seq.*), as amended by the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519 29 U.S.C. 401, *et seq.*) are as follows:

"TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

"SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"'FINDINGS AND POLICIES

"'SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"'The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabili-

zation of competitive wage rates and working conditions within and between industries.

"'Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"'Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The limitation of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"'It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"'DEFINITIONS

"SEC. 2. When used in this Act—

* * * * * * * * * *

"'(3) The term 'employee' shall include any employee

and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment,

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"'(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

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"'RIGHTS OF EMPLOYEES

"'SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"'UNFAIR LABOR PRACTICES

"'SEC. 8. (a) It shall be an unfair labor practice for an employer—

"'(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"'(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"'(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that mem-

bership was denied or terminated for reasons other condition of acquiring or retaining membership;

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'(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

"'(b) It shall be an unfair labor practice for a labor organization or its agents—

"'(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

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"'REPRESENTATIVES AND ELECTIONS

"'SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

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"'(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"'(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"'(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.'

* * * * * * * * * * *

"TITLE III

"SUITS BY AND AGAINST LABOR ORGANIZATIONS

"SEC. 301. (a) Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce as defined in

this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

APPENDIX B

Opinion of Arbitrator Gerald A. Barrett, Issued September 24, 1958

The Union on April 29, 1958 requested a reopening of the contract of the parties dated October 15, 1955, acting under Article XXI, and thereafter filed a grievance dated May 15, 1958 seeking a 7.31% wage increase under Article XXI. The parties were unable to settle the issues through the grievance procedure set forth in Article XXV. The Union then requested that the issues be submitted to arbitration as provided in Article XXV(1)(d). The undersigned was notified of his selection to serve a sthe Arbitrator by letter dated June 6, 1958. A hearing was thereafter held before the Arbitrator on September 9, 1958 in Asheville, North Carolina, at which both parties appeared and were afforded a full opportunity to present testimony and argument in support of their respective positions.

The text of the grievance, dated May 15, 1958, reads as follows:

> "We are asking a 7.31% wage increase to compensate for the increase in the cost of living. We are acting under Article 21 of the contract."

There is no issue of fact between the parties in this proceeding. The parties signed their first collective bargaining agreement on October 15, 1955 with a specified duration in Article XXVII of September 30, 1958. Article XXI provides as follows:

> "The wage terms herein contained may be subject to reopening annually in the event of a change of at

least five (5%) percent in the Consumers Price Index of the U.S. Department of Labor. Should the parties for any reason fail to reach agreement upon such increase, then such disagreement shall be treated as a dispute under this agreement and be adjusted as any other dispute, through the machinery for adjustment of disputes, as provided in this agreement."

No reopening or attempt to reopen occurred from the signing of the contract on October 15, 1955 until the Union addressed the following telegram to the Company on April 29, 1958:

"Pursuant to Article Twenty One Redpening we wish to meet with your firm to negotiate wage increases and other benefits will call you for appointment."

In response to this telegram the parties met on May 8, 1958 but the Company declined to engage in the negotiations requested by the Union, taking the position that a reopening under Article XXI was not authorized at that time. The Union then filed the present grievance on May 15th seeking an award under Article XXI granting a wage increase amounting to 7.31%, this figure being the extent of the increase calculated by the Union in the Consumers Price Index issued by the U. S. Department of Labor between October 1955 and April 1958. Two separate issues were raised at the hearing, (1) whether the Union was authorized by Article XXI to reopen wages on April 29, 1958, and (2) if a reopening was authorized at that time, whether the requested wage increase of 7.31% may properly be granted under Article XXI in this proceeding.

The Arbitrator has given careful consideration to the evidence and arguments submitted by both parties in the light of the provisions of the contract, and finds that the reopening requested by the Union on April 29th was clearly

authorized by Article XXI. The Company argument is that the provision for a reopening "annually" permits a reopening only on the anniversary dates of the contract, and that the Union may therefore reopen under Article XXI only on October 15th. This argument ignores the obvious meaning of the language in Article XXI that a reopening "annually" is intended to preclude reopenings more frequently than once a year. The parties did not specify in Article XXI that reopenings could only occur on the anniversary date of the contract, and such an interpretation is unwarranted by their language when they have demonstrated in Article XXVII that they were well aware of the necessary language to achieve such a result. The Company further urges that "annually" implies the anniversary date of the agreement, because the contract would otherwise be subject to reopening whenever the Consumers Price Index changed by 5%. This contention misconceives the meaning and evident purpose of Article XXI. Following the signing of the agreement on October 15, 1955, the Union became authorized to thereafter request a reopening whenever the Consumers Price Index increased by at least 5%. In the event that the Consumers Price Index subsequently increased by an additional 5%, the Union would be authorized to request another reopening under Article XXI only after the lapse of one year from the prior reopening. An increase of 5% in the Consumers Price Index is thus the necessary condition to a proper demand for a reopening under Article XXI, but the timing of such reopening may not occur within one year from any prior reopening which may have occurred under Article XXI. Inasmuch as there is no dispute over the Union assertion that the Consumers Price Index has increased by at least 5% between October 15, 1955 and April 29, 1958, and inasmuch as the Union has previously requested no reopening throughout this period until April 29, 1958, the Arbitrator holds that the requested reopening was authorized by Article XXI.

Concerning the second issue raised at the hearing, however, the Arbitrator must necessarily rule that the Union request for a wage increase of 7.31% in this proceeding is premature and unauthorized at this time. The unchallenged evidence is that the parties have thus far engaged in no discussions or bargaining under Article XXI over the wage increase sought by the Union. When the parties met on May 8th as a result of the Union demand for a reopening, the Company asserted that a reopening was in its view unauthorized at that time and consequently declined to bargain on the issue of a wage increase. Article XXI authorizes arbitration over the issue of such wage increases, when the parties "fail to reach agreement upon such increase." There is no alternative to the conclusion that the parties at this point have not yet failed to reach an agreement upon such increase, for the obvious reason that they have not yet discussed the increase. There is no evidence thus far whether the parties will agree or disagree over the amount of the increase or the application of the increase to the existing wage scale. These are matters under Article XXI which rest initially in the hands of the parties through the collective bargaining process. If the parties fail to reach agreement, then arbitration of their differences is authorized under Article XXI and Article XXV. Arbitration is not authorized until the parties have sought to reach agreement and have failed to do so.

For the foregoing reasons, the award rules that the Union request for a reopening on April 29, 1958 was authorized under Article XXI, and further rules that the Union grievance seeking a wage increase of 7.31% is premature under Article XXI, without prejudice to the Union's reassertion of its grievance if the parties fail to reach agreement.

APPENDIX C

Award of Arbitrator Gerald A. Barrett, Issued September 24, 1958

1. The Union request dated April 29, 1958 for a reopening under Article XXI is hereby found to constitute a timely and authorized request under Article XXI.

2. The Union grievance dated May 15, 1958 seeking a wage increase of 7.31% under Article XXI is hereby found to be premature under Article XXI, without prejudice to the reassertion of the grievance if the parties fail to reach agreement upon such increase.

Dated: September 24, 1958

GERALD A. BARRETT,
Arbitrator

APPENDIX D

Opinion of the United States District Court for the Western District of North Carolina, Issued December 31, 1959

Warlick, *District Judge*

This matter comes before the court on plaintiff's motion for Summary Judgment under Rule 56 Federal Rules of Civil Procedure, in which motion plaintiff seeks to have an Arbitration Award enforced. Thereafter the defendant filed a similar motion for Summary Judgment. Both motions were heard together and following the oral argument of counsel briefs were filed as requested by the Court.

Since there appears to be no genuine issue as to any material facts it would seem that a Summary Judgment should be granted and under that assumption the following facts, being undisputed, are found by the Court.

The International Garment Workers' Union, AFL-CIO and the defendant entered into a collective bargaining contract covering employees at the defendant's manufacturing plant in Biltmore in the Western District of North Caro-

lina on October 15, 1955, which contract, according to its terms was to continue in effect until September 30, 1958. Shortly after the execution of this contract the International Union chartered plaintiff to administer the contract. A copy of said contract was attached to the complaint and as such made a part thereof.

On April 29, 1958, plaintiff, under the terms of Article 21 of the contract notified defendant that it desired to negotiate concerning a raise in the wage rate, in which notice plaintiff asserted that the cost of living in the Consumer's Price Index of the United States Department of Labor had increased in excess of 5% and accordingly that the employees of defendant were entitled therein to such increase. Defendant maintained that this was not the proper nor appropriate time for a reopening of said contract and thereupon refused to meet with plaintiff on this issue. Accordingly plaintiff filed a grievance under Article 25 of the contract, a copy of which was filed as an exhibit to the complaint. Since this grievance was not adjusted, the parties subsequently agreed under Article 25 to submit the dispute to arbitration and Professor Gerald Barrett of the University of North Carolina was selected and was so notified by letter dated June 6, 1958.

The Arbitrator set a hearing in the City of Asheville for September 9, 1958, at which time both parties appeared by counsel gave testimony and submitted argument in support of their positions. The Arbitrator handed down his opinion and award on September 24, 1958, a copy of which likewise was attached to and made a part of the complaint.

Two issues were submitted to the Arbitrator,—(1) in substance whether the Union was authorized by Article 21 to reopen wages on April 29, 1958, under the terms of the contract dated October 15, 1955, (2) and if a reopening was authorized at that time, whether the requested wage increase of 7.31% could properly be granted under Article 21 in this proceeding.

Among other things the Arbitrator determined, (1) that the Union request dated April 29, 1958, for a reopening under Article 21 is found to constitute a timely and authorized request under said Article. (2) The Arbitrator further determined that the Union grievance dated May 15, 1958, seeking a wage increase of 7.31% under Article 21 is found to be premature and unauthorized for that the parties hereto have thus far had no discussions or attempted to bargain under the terms of the contract over such wage increase sought by the Union and for that and other reasons held that issue in abeyance without prejudice to its being reasserted at a latter date,—should the parties subsequently fail to reach an agreement upon such increase as the contract provides.

Unquestionably this second finding was a directive to the parties to meet and bargain on the wage increase, if any, as the contract stipulates. The parties evidently failed to agree on a date for such meeting and it was not until November 3, 1958, subsequent to the expiration of the contract that the plaintiff formally made such request.

Article 21 of the contract is as follows:

"Article XXI: Reopenings

"The wage terms herein contained may be subject to reopening annually in the event of a change of at least five (5%) percent in the Consumer's Price Index of the U. S. Department of Labor. Should the parties for any reason fail to reach agreement upon such increase, then such disagreement shall be treated as a dispute under this agreement and be adjusted as any other dispute, through the machinery for adjustment of disputes, as provided in this agreement."

On October 1, 1958, in a representation election conducted by the National Labor Relations Board among defendant's employees, plaintiff was ousted as bargaining agent for said employees.

The defendant has at all times since failed and refused to bargain with the plaintiff on the issue of the wage increase, contending among other things, that since the plaintiff was not at the time of the formal request, representing the defendant's employees, that the issue was moot and any act done thereunder would be unenforceable. I cannot go along with this contention for that it would seem that since the contract makes provision for a wage increase and if such was warranted under the change in the cost of living as is reflected in the Consumer's Price Index referred to in Article 21 of the contract, then the employees of defendant would be entitled to such cost of living increase, and I dismiss such contention as not being worthy of further thought.

The defendant further contends that a fair interpretation of the contract would indicate that the application for a wage increase under Article 21 could only be made once each year and that on the anniversary date of said contract. I do not think this contention has any merit and dismiss it as such; the Arbitrator in his ruling likewise dismissed this contention as lacking in value.

The opinion of Judge Soper in Enterprise Wheel and Car Corporation v. United Steelworkers of America, 269 F. 2d 327, in our own Fourth Circuit, is in my opinion controlling. This decision was handed down on June 16, 1959, and in conjunction with an opinion likewise by Judge Soper in Textile Workers Union of America v. Cone Mill Corporation, also decided on June 16, 1959, 268 F. 2d 920, is decisive of the law involved in this controversy.

The plaintiff had a substantive right under its contract with the defendant and evidently thereunder, in so far as the record indicates, no controversy arose during the existence of said contract until the Consumer's Price Index of the Department of Labor indicated a change in excess of 5% in the cost of living. Then plaintiff, acting for defendant's employees as their bargaining agent, requested

consideration of this issue on April 29, 1958. The evidence all points to the fact that defendant's employees were entitled to this particular wage increase and the fact that the machinery set up for its accomplishment, through no fault of plaintiff, was delayed beyond the time of the expiration of the contract could not be a defense to a right the defendant's employees had through plaintiff as their representative or bargaining agent.

Accordingly plaintiff is entitled to have this issue determined under the terms of its contract with defendant and if it makes good in its evidence that such wage increase was due defendant's employees as is provided for by the contract, defendant would be obligated to pay such increase from the 29th day of April 1958 down through and including September 30, 1958.

Since all of the facts found above are not in any wise in dispute, it would appear that plaintiff is entitled to Summary Judgment approving and confirming said Arbitration Award and adjudging the defendant to faithfully abide by its provisions and accordingly that defendant be restrained and enjoined from in any manner failing and refusing to abide by the terms of said Award.

Counsel will submit decree.

This 31st day of December, 1959.

WILSON WARLICK
United States District Judge for the Western District of North Carolina

APPENDIX E

Decree of the United States District Court for the Western District of North Carolina, Issued November 10, 1960

This cause came on to be heard on plaintiff's motion for Summary Judgment, and the Court having considered the pleadings, evidence, briefs, argument of counsel, and the

entire record in the case, has made and filed its Memorandum Opinion, dated December 31, 1959, finding and concluding that the Arbitration Award sought to be confirmed and enforced should be so confirmed and enforced.

NOW THEREFORE, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED THAT:

1. The Arbitration Award constituting the basis of this cause is hereby confirmed and enforced.

2. The Defendant shall faithfully abide by all the terms and provisions of said Arbitration Award.

3. The Defendant is hereby restrained and enjoined from in any manner failing and refusing to abide by the terms of said Award.

4. The Defendant shall, pursuant to said Award, and upon request of plaintiff, and on agreeing to a date and place of hearing, meet with representatives of plaintiff for the purpose of determining the wage increase due defendant's employees, if any, represented by plaintiff, because of the rise in the Consumers' Price Index of the U. S. Department of Labor; that upon agreement between the parties, the defendant will pay to each employee the wage increase, if any, due him or her for the period from April 29, 1958 to September 30, 1958; that in the event the parties are unable to reach an agreement on the wage increase due each employee, such dispute shall be resubmitted to Professor Gerald A. Barrett, the Arbitrator herein, for the purpose of making such determinations, each party paying one-half (½) of the cost of such arbitration; that thereafter defendant will pay to each employee the wage increase due him or her as determined by Professor Barrett for the period from April 29, 1958 to September 30, 1958.

5. That the Defendant be, and it hereby is, charged with the costs of this action to be taxed by the clerk.

Dated this 21st day of January, 1960.

s/ WILSON WARLICK
United States District Judge for the Western District of North Carolina

Appendix F

Opinion of the United States Court of Appeals for the Fourth Circuit, Entered January 21, 1960

Appeal from the U.S. District Court for the Western District of North Carolina. Vacated and remanded.

Herbert L. Hyde (Van Winkle, Walton, Buck and Wall on brief), for appellant.

Robert Cohen (Morris P. Glushien and Earl Fowler on brief), for appellee.

Before Haynsworth and Boreman, Circuit Judges, and Charles F. Paul, District Judge.

FULL TEXT OF OPINION

HAYNSWORTH, Circuit Judge: An employer appeals from an order requiring it to bargain with a decertified, minority union. Its principal position was that the question about which the union wishes to negotiate became moot when an earlier contract between the employer and the union expired. We find no merit in the contention. Questioning the propriety of an order requiring an employer to bargain with a union which does not represent the employees, we requested additional briefs, which have been filed with us.

We cannot affirm the order.

On October 15, 1955, the employer and the union entered into a collective bargaining agreement for a term ending almost three years later, on September 30, 1958. Included

in this agreement was a clause[1] permitting an annual reopening of wages in the event of a change of at least five per cent in the Consumer's Price Index of the Department of Labor. It provided that if the parties were unable to agree upon the reopened wage question, it should be treated as a dispute, subject to adjustment as such. By other clauses of the contract, disputes were made arbitrable.

On April 29, 1958, the union undertook to exercise its asserted right to reopen the wage question, the Consumer's Price Index having risen 7.31% since the execution of the contract. The employer contended the provision for annual reopening of the wage question was referable to contract anniversary dates and that there was no right to reopen the question five months before the contract was to terminate. This dispute went to arbitration. The arbitrator, agreeing with the union, ruled that the word "annually meant only that the question could not be reopened more frequently than once in any 12 month period and that the union had a right to reopen in April.

In that proceeding the union sought to have the arbitrator fix the wages. The arbitrator refused to do that upon the ground that the contract made the reopened question one for negotiation, and it could become subject to arbitration only if negotiation and the preliminary procedures for the adjustment of disputes failed to produce agreement. The award, therefore, was a direction to the parties to negotiate the matter.

The arbitrator's award was announced on September 24, 1958. Six days later, on September 30, 1958, the contract expired. On the next day, October 1, 1958, under the

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[1] "The wage terms and terms herein contained may be subject to reopening annually in the event of a change of at least five (5%) percent in the Consumers Price Index of the U.S. Department of Labor. Should the parties for any reason fail to reach agreement upon such increase, then such disagreement shall be treated as a dispute under this agreement and be adjusted as any other dispute, through the machinery for adjustment of disputes, as provided in this agreement."

supervision of the National Labor Relations Board a representation election was held among the employees of this employer. The election resulted in a rejection of the union and its decertification by the Board.

Over a month later, in November 1958, the union, which had lost its certified status and no longer represented a majority of the employees, requested the employer to negotiate with it on the question of wages for the 5-month period, May through September, 1958. When the employer declined, the union filed this action to enforce the arbitrator's award directing such negotiation.

The District Court granted the union's motion for summary judgment.[2]

The employer's principal contention on appeal is that the wage question became moot when the contract expired. We do not agree. If the union had not lost its certified status, the law would have required the employer to bargain in good faith with the union on the terms of a new contract and on the wages for the final five months of the old contract period. These bargainable issues would not be eliminated or restricted by expiration of the old contract. By force of the reopening of the wage question, the employees, during the 5-month period, had been working for indeterminate wages to be fixed by subsequent agreement. So long as the union was their bargaining representative, it had the exclusive right to negotiate that agreement for them and the employer was under a duty to deal with it.

In the District Court, the employer had advanced the union's decertification as a reason for not enforcing the arbitrator's direction to negotiate with it. Since the District Judge did not discuss the point in his opinion, it is possible it got lost in the multiple, futile defenses set up by the employer. Concerned that we were being asked

[2] 179 F. Supp. 222.

to affirmatively order the commission of an unfair labor practice, we requested additional briefs addressed to the point.[2] We have concluded we cannot order an employer to bargain on the subject of the employee's wages with a union which does not represent the employees.

The basic policy of the National Labor Relations Act,[3] as amended, is incorporated in § 7 of that Act.[4]

It is plain that employees have the right to virtue of § 7 to designate a union to represent them and it is equally plain that they have the right to decline to be represented by a union. By § 8(a)(1) of the Act the employer is guilty of an unfair labor practice if he interferes with the employees' right to join a union, or with their right not to join or be represented by a union. Similar interference by a union is an unfair labor practice under § 8(b)(1). There are many cases which hold that employers committed unfair labor practices when they entered into agreements, affecting the employees generally, with a favored or minority union.[5] These are not cases of employer domina-

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[3] 29 USCA § 151, et seq.

[4] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[5] See Machinists Local v. National Labor Relations Board, 362 U.S. 411; Elastic Stop Nut Corp. v. NLRB, 8 Cir., 142 F.2d 371; NLRB v. Booker, d.b.a. Atlantic Stages, 5 Cir., 180 F.2d 727; Katz, d.b.a. Lee's Department Store v. NLRB, 9 Cir., 196 F.2d 411; NLRB v. John Engelhorn & Sons, 3 Cir., 134 F.2d 553; NLRB v. Goshen Rubber and Mfg. Co., 7 Cir., 110 F.2d 432; NLRB v. National Motor Bearing Co., 9 Cir., 105 F.2d 652; Douds v. Anheuser-Busch, Inc., D.C.N.J., 99 F. Supp. 474.

tion resulting in a norder of disestablishment of the dominated union, but are cases where the union was truly independent, but, for some reason, was favored by the employer with the result that he deprived his employees of the right not to be represented by that union. The same principle has been applied where a company constructs a new plant and enters into a contract with the union, representing others of its employees elsewhere, with respect to the new plant before a representative number of new employees had been employed at the new plant and had exercised their right to choose.[6] Administratively, the sion of an existing contract to a new plant was not an unfair labor practice if the new plant was merely an accretion to an existing unit, but, if the new plant is really a separate unit, the employees at that plant, after their employment, have a right under § 7 to be represented by a union if they wish it, and a right not to be if they do not wish it.

There are some exceptions, of course, to the rule that the employer may not bargain with a minority union.

The courts and the Board are agreed that after a union has won an election and has been certified, the employer is under the duty to bargain with the certified union for a reasonable time even though the union loses its majority. We held in Poole Foundry & Machine Co. v. NLRB, 4 Cir. 192 F. 2d 740,[7] that an employer could not refuse to bargain with a certified union where only four months had elapsed after adoption of a settlement agreement. The

[6] Douds v. Anheuser Busch, Inc., D.C.N.J., 99 F. Supp. 474; see Elastic Stop Nut Corp. v. NLRB, 8 Cir., 142 F.2d 371.
general counsel of the Board ruled in 1956[7] that an exten-

[7] Case No. K-299, 2 CCH Labor Law Reporter, par. 3815.333.

[8] See also NLRB v. Appalachian Electric Power Co., 4 Cir., 140 F.2d 217; NLRB v. Century Oxford Mfg. Corp., 2 Cir., 140 F.2d 541.

Board has a general rule which it applies that it will not entertain another representation petition for one year from the date of certification, and, of course, under the present act, there is a continuing duty of the employer to bargain with a certified union at least until a decertification petition has been filed, for that is now the only means by which a question of the majority status of a certified union can be raised.[9] If an incumbent union has not been certified, however, and loses its majority, the employer has not only the right, but the duty, to cease bargaining with it.[10]

Another exception to the general rule arises where the loss of majority status has been occasioned by the employer's unfair labor practices.[11]

Here, we have none of those things. The union has been decertified, which means that the Labor Board has certified that it is no longer the representative of the employees, and it cannot become a proper representative of the employees until it re-establishes its majority status. There is no claim that the union lost its majority status by an unfair labor practice of the employer; indeed, it would not have been decertified by the Board if an unfair labor practice had occasioned its loss of members. The union claims generally that its loss of its majority was the fault of the employer, but it did not charge in the representation case that the employer committed an unfair labor practice and there is no basis on this record for a finding that it did. It seems,

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[9] Brooks v. NLRB, 348 U.S. 96.

[10] NLRB v. Reeder Motor Co., 6 Cir., 202 F.2d 802; NLRB v. Mayer, 5 Cir., 196 F.2d 286.

[11] Franks Bros. Co. v. NLRB, 321 U.S. 702; NLRB v. P. Lorillard Co., 314 U.S. 512; Great Southern Trucking Co. v. NLRB, 4 Cir., 139 F.2d 984; NLRB v. Highland Park Mfg. Co., 4 Cir., 110 F.2d 632.

therefore, that we have the simple case of a minority union seeking to act as the exclusive representative of the employees with respect to their wages for this limited period. If we compel the employer to bargain with this union under these circumstances, we compel the employer and permit the union to commit an unfair labor practice in violation of the rights guaranteed to the employees under § 7.

The courts have been extremely careful to protect the rights of employees under the act and to avoid ordering an employer to bargain with a union if there was even so much as doubt about the majority status of the union.

In National Labor Rel. Bd. v. Inter-City Advertising Co., 4 Cir., 154 F.2d 244, an employer committed an unfair labor practice by refusing to bargain with an incumbent union. Thereafter, the union lost its majority status under circumstances which led the Court to conclude that its loss was not the fault of the employer. Because of the unfair labor practice, the refusal to bargain, the Board had ordered the employer to bargain with the union, but this Court, notwithstanding it found that the unfair labor practice had been committed at a time when the union did represent the majority, refused to enforce the order. Judge Soper said:

"• • • It follows that when a union majority has been dissipated without fault on the part of the employer the union no longer possesses the authority to speak for the employees and an order of the Board that requires the employer to bargain with the union cannot be enforced. • • •"

We conclude that this uncertified, minority union has no right to represent the employees and the employer no right to deal with it as the representative of the employees. Should they deal with each other on any such basis they would invade the statutory right of the employees.

We do not understand the union to really question these principles. Rather, it leaps to the assumption that the contract created a fixed, accrued right to a wage increase proportionate to the increase in the cost of living. In effect, it asserts here what it unsuccessfully asserted when it attempted to have the arbitrator fix the wages by ordering a 7.31% increase.

The contract is not susceptible to that interpretation. Indeed, the union's action is to enforce the arbitrator's award, which directs negotiation only. It cannot consistently seek enforcement of the award and disclaim the necessity of negotiation.

We conclude that the union cannot exercise a right of representation it no longer possesses and the employer should not be forced to commit an unfair labor practice by dealing with the union as the representative of the employees.

Our conclusion does not affect the substance of the award, however. The award was valid when it was made. It became unenforceable only subsequently when the employees repudiated their previously designated agent. The difficulty is with the procedural direction of the award. Its substantive declaration of the right of the employees to negotiate the wage question, and to arbitrate it if need be, was not made unlawful by the events of September 30-October 1, 1958. The decertification of the union required only an amendment of the award to revoke the commitment of the rights of the employees to their repudiated agent.

Under the circumstances, it seems appropriate to refer the entire matter back to the arbitrator who may reframe the award in the light of subsequent developments. Unless the substantive right of negotiation has been foreclosed by other events, he may order the employer to negotiate

the wage question with the employees directly or with any properly constituted committee or representative of the employees. The specific procedures to implement his award should be developed by the parties in interest or prescribed by the arbitrator after inquiry. Those remedial procedures which, in the light of current conditions, are most practical and most likely to facilitate a resolution of the question may thus be employed.

The judgment will be vacated and the case remanded to the District Court for further proceedings not inconsistent with this opinion.

Vacated and remanded.

APPENDIX G

Decree of the United States Court of Appeals for the Fourth Circuit, Entered November 10, 1960

APPEAL FROM the United States District Court for the Western District of North Carolina.

THIS CAUSE came to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of North Carolina, at Asheville, for further proceedings not inconsistent with the opinion of the Court filed herein; and that each party bear its own costs on appeal.

November 10, 1960.

CLEMENT F. HAYNESWORTH, JR.
United States Circuit Judge